No. 15094

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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MILETON GRADY RAMSEY,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLEE'S BRIEF.

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### I.
### JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the United States District Court for the Southern District of California. The jury found appellant guilty of the offenses contained in Counts Two, Three, Four and Five of a six count indictment which charged him as follows, in the counts wherein he was convicted: Count Two, with carrying on the business of a distiller without giving a bond and with intent to defraud the United States of the tax, Title 26, United States Code, Section 5176(a); Count Three, engaging in the business of a distiller or rectifier without giving notice, Title 26, United States Code, Sections 5175(a) and 5271(a); Count Four, carrying on the

business of a rectifier and failing to pay the special tax, Title 26, United States Code, Section 5081; and Count Five, with possession of distilled spirits which did not have a strip stamp affixed to the immediate container denoting payment of the internal revenue tax, Title 26, United States Code, Section 5008(b)(1).

The District Court had jurisdiction based upon Title 18, Section 3231, and this Court has jurisdiction to entertain the appeal and review the judgment under the provisions of Title 28, Sections 1291 and 1294 of the United States Code.

## II.
## STATEMENT OF THE CASE.

The jury found appellant guilty of possession of tax unpaid distilled spirits, and of engaging in the business of a distiller and rectifier without giving a bond, with intent to defraud the United States of the tax, without giving notice and failing to pay the special tax, in violation of the Internal Revenue Code of 1939, United States Code, Title 26, Sections 5008(b)(1), 5176(a), 5175(a), 5271(a), and 5081, respectively.

On September 15, 1955, a search warrant was obtained to search the premises located at 1011 and 1011½ 223rd Street, Torrance, California, for tax unpaid distilled spirits. The warrant was executed on said premises on the same date, shortly after noon, at approximately 12:20 p. m., by investigators from the Alcohol and Tobacco Branch of the Internal Revenue Service in Los

Angeles, California. The investigators found a total of approximately 40 gallons of tax unpaid distilled spirits on said premises. About 16 or 17 gallons were found in a barrel or rectifying still and about 23 or 24 gallons were found in case lots, in one gallon jugs. In addition, during the search of the premises for tax unpaid distilled spirits, the investigators found the unassembled component parts for one copper pot type still, 550 pounds of dextrose or corn sugar, five gallons of dextrose malt syrup, 26 oak barrels, and miscellaneous distilling equipment. Appellant admitted that he was the person named in the warrant. He was then placed under arrest on the premises during the search and subsequently indicted, tried and convicted of violations alleged in the aforesaid counts.

## III.
## STATUTES INVOLVED.

1. The Government offered no evidence in support of Count One of the indictment because the still was not assembled or "set-up" when discovered. A motion for judgment of acquittal was granted as to this Count [Tr. p. 221].

2. Count Two of the indictment against appellant concerns a violation by him of United States Code, Title 26, Section 5176(a) which provides in pertinent part as follows:

> "Every person intending to commence or to continue the business of a distiller shall, . . . execute a bond . . ."

3. Count Three concerns violations of United States Code, Title 26, Sections 5175(a) and 5271(a) which provide in pertinent part as follows:

> "Every person engaged in, or intending to be engaged in, the business of a distiller, shall give notice . . ."

[and]

> "Every person engaged in, or intending to be engaged in, the business of a rectifier, shall give notice . . ."

4. Count Four relates to a violation of United States Code, Title 26, Section 5081 which provides in part:

> "Every rectifier of distilled spirits . . . shall pay a special tax . . ."

5. Count Five concerns possession of tax unpaid distilled spirts in violation of United States Code, Title 26, Section 5008(b)(1) which in pertinent part provides as follows:

> "No persons shall . . . possess, . . . any distilled spirits, unless the immediate container thereof has affixed thereto . . . a stamp evidencing the tax . . ."

6. The jury acquitted appellant of the violation charged in Count Six of the indictment.

## IV.
## ARGUMENT.

### A. The Trial Court Properly Denied the Motion to Suppress Evidence.

#### (1) The Search Warrant Was Valid.

Appellant was indicted on September of 1955; on October 31, 1955, the case was set for trial December 20, 1955; and on December 20, immediately prior to selection of the jury, appellant filed his written "Motion to Suppress Evidence and Dismiss Case."

The motion [Tr. pp. 6, 7] was argued by respective counsel. Appellant contended at that time that there was nothing wrong with the search warrant but that the search warrant provided for a search for illegally possessed spirits only and did not extend to a search for the other articles which were found on the premises while searching for alcoholic spirits [Tr. pp. 32-33].

As the validity of the search warrant was not questioned below, its validity cannot be raised for the first time on appeal.

#### (2) The Scope of the Search Warrant Provided for a Search of the Premises for Tax Unpaid Distilled Spirits.

Appellant alleged in said Motion to Suppress Evidence and Dismiss Case that the search warrant was obtained to search the premises for the tax unpaid distilled spirits only [Tr. pp. 6-7]. Appellant has correctly stated the full scope of the search warrant.

**(3) The Distilled Spirits Were Found on the Premises Upon Execution of the Search Warrant.**

Premises means the land and its appurtenances.

*City of Newark v. Lippmin,* 177 Atl. 556.

Premises includes the garage (dictum).

*Cantrell v. United States* (C. C. A. 5), 15 F. 2d 953, 954.

When the search warrant was issued, if it had been intended to limit its scope to a grant of authority to search the two houses only, the warrant could have so provided. Instead, it granted authority to search the premises.

In the *Cantrell* case the court discussed the garage as being a portion of the premises. Similarly, in the instant case, the sheds were on the premises and the discovery of tax unpaid distilled spirits thereon subsequent to display of the search warrant to appellant was not an unreasonable search and seizure but was pursuant to the express consent and authority conferred upon the investigators by the warrant.

Parenthetically, the metamorphosis from the position originally taken by appellant in arguing his motion to suppress evidence, is revealing. On the first day of trial but before commencement thereof, appellant conceded the validity of the search which resulted in discovery of the approximately 40 gallons of tax unpaid distilled spirits and only questioned the admissibility of anything else found on the premises such as a still. For example:

> "The Court: Well, you admit now that the warrant is good as far as 40 gallons of un-tax-paid distilled spirits is concerned?

Mr. Lavine: That's correct . . .

The Court: They had a right to go in and get the 40 gallons of untaxed distilled spirits.

Mr. Lavine: That is correct."

The search of the premises and discovery of the tax unpaid distilled spirits occurred as follows:

There were two houses on the premises, "within the same enclosure" [Tr. p. 42]. The investigators entered the larger house at 1011, but did not remain very long because there was no odor of distilled spirits. Investigators Awrey and Jones made a quick survey of the smaller house on the premises with a similar result [Tr. p. 44]. Investigator Awrey then met Investigator Warner back of the little house near two sheds and a locked garage or shed on the premises [Tr. p. 44]. From the first shed there emanated a strong odor of fermentation; from the small garage or shed the odor of distillation was much stronger and included the odor of liquor [Tr. p. 44].

Investigator Travis requested the keys to the outbuilding from appellant who did not reply [Tr. p. 74]. Investigator Travis then advised appellant that out of due respect for appellant's property, they did not care to break the lock; that actually his giving the keys did not make any difference but that he should open it if he had the keys [Tr. pp. 192, 195]. Investigator Coughran, in the presence of appellant, told Investigator Travis to go ahead and knock the locks off. Appellant then produced the keys [Tr. p. 74] and unlocked the first shed [Tr. p. 106]. It contained some 50 gallon barrels, a water heater, a pump, a motor and some sacks of sugar [Tr. p. 106]. Then appellant unlocked the second shed which contained two five-gallon jugs containing a brown

liquid that smelled, and tasted like and had the appearance of whiskey [Tr. p. 106]. Proof that the liquid was distilled spirits is shown at length in IV B(4), *infra.*

Appellant stated the entire operation was his alone and had been going on about two or three months [Tr. pp. 106-107]. Appellant stated that he owned the still himself [Tr. p. 58].

The aforesaid circumstances adequately show that distilled spirits were found on the premises.

**(4) Appellant Did Not Claim to Be an Occupant of the Premises so He Cannot Now Contend the Search of the Premises Was Unreasonable or Unlawful.**

Where appellant does not claim he was an occupant of the premises searched he cannot contend the search of the premises was unreasonable or unlawful as to him.

*Cantrell v. United States, supra.*

Prior to and during the trial, appellant Ramsey introduced no evidence that he was an occupant of the premises in question and did not claim to be an occupant. To the contrary, when Investigator Warner asked appellant if he lived there he said, "No, I'm the gardener." [Tr. p. 105.] Accordingly, as in the *Cantrell* case, appellant may not affirmatively assert for the first time, on appeal, that he was an occupant of the premises and that the search was not made pursuant to a valid warrant.

**(5) Evidence of the Component Parts of a "Still" and of Ingredients for the Making of Distilled Spirits Were Properly Discovered by the Investigators During Their Search of the Premises for Tax Unpaid Distilled Spirits.**

The seizure of contraband material found on the premises during the course of a valid search for other material, is not obtained by an unauthorized search and seizure even though the officers are not aware the material is on the premises when the search is initiated.

> *Harris v. United States,* 331 U. S. 145, at pp. 154-155.

In the *Ramsey* case, the investigators were on the premises searching for tax unpaid distilled spirits, pursuant to the search warrant. Both before and after they found distilled spirits, they found additional evidence that appellant was engaged in the business of a distiller or rectifier. Investigator Awrey testified that as soon as they found the tax unpaid spirits, appellant was placed under arrest; they did not know but what there were other distilled spirits on the premises so the search for distilled spirits was continued and further evidence of the other violations were found in the continued search for distilled spirits. Surely the investigators under those circumstances, would not be required to turn their backs on the evidence of commission by appellant of other offenses.

Evidence of the discovery of 550 pounds of dextrose or corn sugar, five gallons of malt, about 26 oak barrels, two rectifying stills, and the numerous unassembled component parts for a copper pot type "still" was all properly admissible having been discovered while the premises were being searched for tax unpaid distilled spirits.

The unassembled still and ingredients for making distilled spirits, were evidence that appellant was carrying on a distilling and rectifying business. This evidence was relevant, was not obtained in deprivation of any rights of appellant, and the trial court properly denied the motion to suppress the evidence thereof.

## B. The Trial Court Properly Denied the Motions for Judgment of Acquittal.

### (1) Only the Owner Who Affirmatively Asserts Ownership May Complain of Alleged Unlawful Search and Seizure of Property.

At no time before or during the trial in connection with his motions, or otherwise, did appellant affirmatively contend that he is the owner of the distilled spirits or other items seized. There was evidence, including defendant's admission, that he was owner, but he must have asserted ownership of the property to complain of alleged unlawful search and seizure thereof. The right to actual or constructive possession of the property allegedly unlawfully seized, must be asserted or the motion to suppress should be denied.

See:

*Shore v. United States,* 49 F. 2d 519.

### (2) The Evidence Sufficiently Showed Appellant Was Carrying on the Business of a Distiller and Rectifier.

In addition to approximately 40 gallons of tax unpaid distilled spirits found on the premises [Tr. p. 79] the investigators discovered ingredients to make distilled spirits [Tr. p. 41], four mash barrels with oak chips [Tr. p. 46], a 100 gallon pot [Tr. p. 47], eight mash barrels used in the last month or so [Tr. p. 50], materials

there sufficient to make the mash [Tr. p. 60], a coil in a barrel [Tr. p. 64], the burner [Tr. p. 66], 3 barrels or 5 gallons or so of yeast [Tr. p. 102], several 100 pound bags of sugar [Tr. p. 157] totalling about 550 pounds [Tr. p. 81], and miscellaneous items such as a motor, purifier [Tr. p. 158], rectifiers, hose and electric motor [Tr. p. 83]. There were parts to assemble a complete still [Tr. p. 50].

In *United States v. 673 cases of Distilled Spirits and Wines,* 75 F. Supp. 622, where there was evidence of one sale, the Court held that it was a business. Appellant Ramsey, when arrested, said that he had a hunch that the 12 gallon deal was a phony [Tr. p. 194]. The reasonable inference is that appellant referred to a 12 gallon sale of distilled spirits by appellant. When asked if he had ever sold any, appellant replied, "Yes," [Tr. p. 204] and concerning his list of customers he stated, "You got my big one last night" [Tr. p. 204].

Out of the presence of the jury, the government stated that it considered the evidence sufficiently showed appellant was engaged in business, but that, out of an abundance of caution, it desired to prove a sale by testimony that a car driven by someone else and containing no distilled spirits, was driven on the premises in question and upon departure from the premises, the car was found to contain distilled spirits [Tr. pp. 185-191, incl., and in particular, pp. 187, 190]. Appellant objected on general grounds [Tr. p. 187] and that it was evidence of a separate crime [Tr. p. 190]. The objection was sustained.

However, proof of even one sale is not essential. In *Blinder v. United States Casualty Co.,* 257 Ill. App. 146, with no direct evidence of any sale, the Court found that

an apartment was being used to conduct a furniture business. In that case, there was furniture in the basement not being used in the apartment, the owner advertised furniture for sale, and furniture was coming and going out of the basement. Appellant Ramsey did not advertise in the newspaper but he had large quantities of liquor on hand, ingredients for distilled spirits were coming in and appellant admitted sales. Further, all of the various and necessary items of equipment and ingredients used in the manufacture of distilled spirits were present on the premises. The owner of the D & D Market testified that appellant purchased malt and yeast on two occasions through the D & D Market. The purchases were wholesale in nature. Appellant ordered the ingredients delivered to the market, which paid for them. Appellant reimbursed the market for its exact cost, without profit to the proprietor [Tr. pp. 99, 100-101]. *Cf.,* The two purchases were about three months apart and appellant stated he had been operating the still for a period of about two or three months [Tr. p. 106].

The government chemist testified that malt and yeast are ingredients for making distilled spirits [Tr. p. 138]. He further testified that there is no significant difference between corn and dextrose sugar for use as an ingredient in distilled spirits [Tr. p. 137]. The 550 pounds of sugar found on the premises is illustrative of the continuing nature of the enterprise unless the illogical assumption be made that sugar, dextrose sugar, in that quantity was possessed by appellant for innocent purposes.

Testimony concerning the ingredients and apparatus for making distilled spirits was offered into evidence for the purpose of showing that appellant engaged in the

business of a distiller or rectifier. It was properly received for this purpose.

Possession by appellant of approximately 40 gallons, of 320 pints of whiskey, on the premises without even any contention that such a large quantity was for personal consumption or use on the premises, is itself some evidence that appellant was engaged in the business of a distiller and rectifier. The ingredients and apparatus for making distilled spirits are further evidence showing that appellant was engaged in the endeavor.

All of the evidence, assuming no direct evidence of a sale, sufficiently showed that appellant was engaged in the business of a distiller or rectifier.

**(3) Appellant Unlawfully Possessed Tax Unpaid Distilled Spirits as Charged in Count Five of the Indictment.**

The scope of the search warrant is discussed in paragraph IV A(2) *supra*. The warrant authorized a search of the premises and the search disclosed distilled spirits. Among other things, appellant said the "still" belonged to him [Tr. p. 202], he had been operating it for two or three months [Tr. p. 106], had not operated it for about a month before apprehension [Tr. p. 162], that the malt found on the premises is something he adds to give it a little different flavor [Tr. p. 203], and four days after his arrest, he revealed his consciousness of guilt by the statement: "I will be willing to plead to a lesser violation than what I am charged with if it's all right with you" [Tr. p. 216]. The liquor was in his constructive possession. He had the keys to the lock on the shed which contained the distilled spirits.

Actual or constructive possession was shown, as aforesaid.

The Government need not prove the nonpayment of the tax, for the matter is peculiarly within the knowledge of appellant.

*Faraone v. United States,* 259 Fed. 507 (C. C. A. Tenn. 1919).

Appellant offered no evidence that he had paid the tax or that strip stamps were affixed to any of the containers of the distilled spirits. The investigators testified there were no strip stamps [see Tr. p. 71].

Nonpayment of the tax was also adequately shown. Accordingly, there was ample evidence for the jury to find that appellant was guilty as charged in Count Five.

**(4) There Was No Fatal Variance Between the Indictment and Proof.**

With reference to Count Five only, appellant alleges a fatal variance between the indictment and proof (Op. Br. pp. 20, 21, 22).

Custody of the two samples of distilled spirits, of Government Exhibits No. 1 and No. 2, from acquisition to introduction into evidence, was clearly shown. Several investigators were present when Investigator Coughran obtained the samples [Tr. pp. 92, 107]. Exhibit No. 1 was an empty jug on the premises which Investigator Coughran filled as a sample with liquid from the rectifying barrel or still [Tr. pp. 89, 107, 159]. Exhibit No. 2 was taken by Investigator Coughran from a group of one gallon jugs which were in cartons in the shed and which contained a liquid which appeared to be liquor [Tr. pp. 85, 107, 156]. At this time, appellant was not present [Tr. pp. 124, 112, see also p. 109].

The investigators scratched their initials on the glass jugs, Exhibits No. 1 and No. 2 [Tr. p. 165] and Investigator Jones took them to the government car and locked them in the trunk [Tr. p. 160]. The next morning, he stored them in the government safe [Tr. pp. 161, 107]. Investigator Warner withdrew samples from Exhibits No. 1 and No. 2, to forward to the chemist in San Francisco [Tr. p. 108]. Exhibit No. 19 was taken from Exhibit No. 2 [Tr. p. 179] and Exhibit No. 18 from Exhibit No. 1 [Tr. p. 109] and Investigator Awrey mailed the two samples, Exhibits No. 18 and No. 19, together with another sample, to the chemist in San Francisco [Tr. p. 175]. Exhibits No. 1 and No. 2, the one-gallon jugs, remained in the government safe until taken to court on the day of trial [Tr. p. 109]. The chemist testified that in his opinion the contents of Exhibits No. 18 and No. 19 are distilled spirits [Tr. p. 137. Note, at page 136 the transcript erroneously refers to sample 18 as Exhibit No. 8, but the subsequent testimony and reference to Exhibit No. 18 reveals the error in transcription].

After the two samples, Exhibits No. 1 and No. 2, were obtained, marked, and locked in the trunk of a government automobile, as aforesaid, Investigator Linder arrived on the premises. He is the group leader [Tr. p. 200]. He did not know that Exhibits No. 1 and No. 2 had been obtained [Tr. p. 209] and were in Jones' car [Tr. p. 216]. Investigator Linder directed Coughran to help obtain samples for Linder [Tr. p. 205]. Investigator Coughran testified he is in no postion to question what Investigator Linder orders [Tr. p. 92]. Investigator Linder marked the caps or tops of his samples [Tr. p. 206]. After destruction of the other material,

the two Linder samples were inadvertently left on the premises. Later, Investigator Linder sent Investigator Warner to obtain these samples [Tr. p. 209]. Investigator Linder learned from Warner that Jones had samples [Tr. p. 209]. Two investigators returned to the premises for the Linder samples [Tr. p. 211]. Investigator Linder had left his samples alongside the room where all the rest of the distilled spirits had been stored [Tr. p. 211]. Before the return of the investigators to the premises, the Linder samples were found, broken and intentionally destroyed by the brother-in-law of appellant [Tr. pp. 225-226].

The intentional destruction of the Linder samples is reprehensible but does not affect the guilt or innocence of appellant. The other samples, Government's Exhibits No. 1, No. 2, No. 18 and No. 19, clearly establish that the liquid found on the premises was distilled spirits.

Of the two one-gallon jugs full of distilled spirits which were introduced into evidence [Exs. No. 1 and No. 2] Exhibit No. 1 was filled by the investigator with liquid from a larger barrel, which appellant himself said contained about 16 or 17 gallons. The one gallon, Exhibit No. 1, which was so obtained, was proved to be distilled spirits. Surely, the remaining 15 or 16 gallons in the same barrel were distilled spirits.

The other one-gallon jug, Exhibit No. 2, was selected at random from a group of about 23 or 24 one-gallon jugs full of liquid resembling liquor. The contents of Exhibit No. 2, so selected, was distilled spirits. A reasonable inference for the trier of fact was that the contents of the other jugs was distilled spirits.

In any event, if there was a variance in proof between the 40 gallons alleged and two gallons proved, the variance did not affect the substantial rights of appellant and he was not taken by surprise by the allegation of approximately 40 gallons and introduction into evidence of two gallons.

Where an indictment alleged 8,301 grains of narcotics sold by defendant and the proof showed only 58½ grains, the variance was not fatal.

*Cromer v. United States,* 142 F. 2d 697, Cert. Den. 322 U. S. 760;

See also:

*Berger v. United States,* 295 U. S. 78, 82.

**(5) Appellant Is Not Charged in Count Five With a Violation of Section 5642.**

Appellant, on page 22 of his brief, alleges that Section 5642 of Title 26 does not forbid *possession of the distilled spirits.* This is patently correct. Section 5642 states only the penalty provided for a violation of Section 5008(b). It is the latter section, *i. e.,* 5008(b)(1), which prohibits possession of tax unpaid distilled spirits, as charged in Count Five of the indictment.

It is doubtful that appellant could have been misled by the references to Section 5642 in the caption of the indictment or elsewhere, as the body of Count Five clearly charges a violation of Section 5008(b)(1).

If appellant was misled, it is not a ground for reversal. An indictment is not defective merely because by inadvertence the wrong statute was referred to, because the statute forms no part of the charge.

*Hoppet v. United States,* 7 Cranch 389, 393.

The Indictment is sufficient if it charges in fact, an offense against the United States.

*Williams v. United States,* 168 U. S. 382, 389;

See also:

*Johnson v. Biddle,* 12 F. 2d 366;

*Martin v. United States,* 99 F. 2d 236;

*Smith v. United States,* 145 F. 2d 643.

**(6) There Was No Stamp Affixed to the Immediate Container in Which the Distilled Spirits Were Found, Denoting Payment of the Tax.**

Appellant apparently asserts on page 22 of his brief, that he did not place the liquid in the one-gallon bottles or jugs which are Government's Exhibits No. 1 and No. 2; that "they were placed in the bottles by the agents themselves" which bottles did not have strip stamps affixed thereto.

The evidence showed that Exhibit No. 2 was full of liquid when discovered and was taken from a group of one-gallon jugs full of liquid [Tr. pp. 85, 107, 156]. None of the jugs or bottles had strip stamps [Tr. p. 71]. Exhibit No. 2 had no strip stamp [Tr. p. 160]. The liquid contained in Exhibit No. 1 was originally found in a barrel which appellant himself estimated contained about 17 gallons. Accordingly, Exhibit No. 1, unlike the other jug in evidence, was filled by the investigator as an exemplar of the substance found in the larger barrel. There were no strip stamps found on the premises and no evidence offered to show payment of the tax. As dis-

cussed in the *Faraone* case, *supra,* the Government need not prove nonpayment of the tax.

The evidence all tended to show that appellant placed the distilled spirits in the various containers in which it was found. As an admission, he said the whole operation was his. If he did not personally fill the containers, he caused them to be filled and is equally guilty.

A person who causes an unlawful act to be done is guilty as a principal.

United States Code, Title 18, Sec. 2(b), and

*Nye & Nissen v. United States,* 168 F. 2d 846, 855; 336 U. S. 613, 620.

**(7) An Affirmative Defense Must Be Raised During Trial.**

Appellant further contends on page 22 of his brief, that "there is no evidence whatsoever that the distilled spirits were not for the immediate consumption on the premises, or for preparation for such consumption."

As stated in Section 5008(b)(1), there are several specific exceptions to criminal liability for possession of tax unpaid distilled spirits which containers thereof do not contain strip stamps denoting payment of the tax. All of these exceptions, including possession for consumption on the premises, are matters which must be raised during trial by way of affirmative defense. Appellant did not assert or attempt to assert this exception in the court below and cannot raise it for the first time on appeal.

See:

*Scher v. Ohio,* 305 U. S. 251.

## C. The Court Did Not Err in Admitting the Exhibits.

As discussed before, tax unpaid distilled spirits were found by a lawful search of the premises. Evidence thereof was properly received.

Similarly, in the search for distilled spirits, additional evidence was discovered which further tended to show that appellant was unlawfully engaged in the business of distilling and rectifying. On authority of the *Harris* case, cited earlier, this additional evidence was properly admitted.

The numerous photographs of the extensive material found on the premises, taken prior to the destruction of the items, were material and relevant on both the issues of possession of distilled spirits and engaging in a business.

## D. The Court Did Not Err in Instructions Given and Refused.

The jury was adequately instructed concerning the essential elements of Counts Two, Three and Four and appellant's proffered instruction number five was properly refused. Appellant's instruction was limited to defining business as meaning "mercantile transactions" and did not include all of the meanings of business. For example, one of the definitions given by Webster is employment. Employment does not necessarily import a rendering of services for another. A person may be employed about his own business.

*State v. Canton,* 43 Mo. 48, 51.

Of course, Count Five prohibits "possession," not "business" and the propriety of conviction and sentence of appellant on Count Five is not raised by appellant in connection with alleged refusal to give instructions.

**E. The Statutes Involved Are Not Unconstitutional.**

Appellant cites no authority and makes no argument in support of his assertion that the statutes are unconstitutional. Accordingly, it suffices to state that the assertion is categorically denied.

**Conclusion.**

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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